IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION
APPEAL FROM ORDER NO.748 OF 2007
IN
NOTICE OF MOTION NO.1602 OF 2006
IN
B.C.C.C.LONG CAUSE SUIT NO.1744 OF 2006

Smt. Shobhana Dattatray Palav
and Others .. Appellants
(Orig. Plaintiffs)

Versus

Municipal Corporation of
Greater Bombay and Ors. .. Respondents
(Orig.Defendants)

Shri N.K.Mudnaney for the Appellants
Shri N.V.Walawalkar i/b.Shri R.A.Malandkar for the Respondent-BMC
Shri A.Y.Sakhare i/b. M/s.YKS Legal for the Respondent No.3

CORAM : S.R.SATHE,J.
DATED : 21/11/2007

P.C. :-

1. By consent the appeal is heard finally at admission stage.

2. Heard Counsel for the parties at length.

3. Appellants-original Plaintiffs have preferred this appeal against the order passed by the Judge, City Civil Court, Mumbai in Notice of Motion No.1602 of 2006 whereby Plaintiff's application for temporary injunction restraining Municipal Corporation of Greater Bombay (hereinafter referred to as MCGB) and its

servants and agents from implementing and/or enforcing their Notice No.E/351/IV/1237/2005-2006 dated 14/02/2006 and from demolishing suit shop till the disposal of the suit was rejected. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

4. Brief facts giving rise to this appeal are as under :-

Plaintiffs' case in brief is that they are the heirs and legal representatives of Late Shri Dattatray Arjun Palav who was running a Gymnasium/ Vyayammandir under the name and style 'Bharatmata Seva Mandal' in a shop situated at Laxmi Building, Dr.B.A.Road, Bombay and a shed situated behind the said shop. Late Shri Harishchandra A. Palav, brother of Dattatray was also looking after the said Gymnasium. During his life time a shed was constructed behind the shop mentioned above and Gymnasium was being run in the shop premises as well as in the shed. Harishchandra died in the year 1961. According to Plaintiffs, the said shed which is the subject matter of the present suit was constructed with the knowledge and consent of the then landlord of the said property namely Ramchandra Chimanlal and others. The suit shed was also assessed by the

Corporation for the purposes of taxes.

5. After the death of Plaintiff's father, one Sulochana Chandrakant Gavade in her capacity as daughter of Harishchandra Palav filed suit No.3236 of 1987 against Plaintiff's father claiming ownership in respect of the said Gymnasium. During the pendency of the said suit Smt.Sulochana Gavade purported to assign the tenancy rights to one M/s. J.Gala Builders, (defendant No.3 in the present suit). It is alleged that defendant No.3 recently purchased the whole property.

6. According to Plaintiffs, defendant No.3 decided to develop the property and agreed to provide alternate accommodation to the tenants of Laxmi Building. However, the owner in collusion with defendant No.3 MCGB managed to issue notice under section 351 of BMC Act to Plaintiffs. Plaintiffs replied the said notice and alleged that suit shed is in existence since long and the notice issued by the Corporation under section 351 of the BMC Act was illegal.

7. The Corporation after considering reply of the Plaintiffs and the material on record, came to the

conclusion that the suit shed was unauthorized and therefore called upon Plaintiffs to remove the said structure and informed that failing which the Corporation would demolish the same.

8. In view of above mentioned notice, Plaintiffs filed the present suit for a declaration that the notice in respect of the suit shed issued by the Corporation is illegal and for permanent injunction restraining Corporation from acting upon the said notice.

9. Plaintiffs also filed Notice of Motion. The defendant opposed the Notice of Motion and contended that the suit shed is unauthorized. Merely because in the earlier proceedings receiver has been appointed in respect of the suit shed that would not make any difference and it would not come in the way of the Corporation to take action under section 351 of the BMC Act.

10. After hearing the arguments of both the learned Advocates and considering the material on record, the learned Judge, City Civil Court, Mumbai came to the conclusion that Plaintiffs have failed to make out any

prima facie case and the balance of convenience is also not in their favour. Naturally, he dismissed the Plaintiff's Notice of Motion.

11. Being aggrieved by the same, Plaintiffs have filed the present appeal.

12. In this appeal before me, the learned Advocate for the Appellant/original Plaintiffs has urged only two points. Firstly, he submitted that in the previous suit filed by Sulochana, it was in fact admitted even by the defendant No.3 that alternate accommodation is to be given to the Plaintiffs in respect of the tenanted premises i.e. Shop and the suit shed. So, now the defendant No.3 is not entitled to contend that suit shed is unauthorized. Secondly, he canvassed before me that the suit shed was assessed for the purposes of taxes by the Corporation since the year 1962 and as such the suit shed falls in the category of tolerated structure and hence, the same can not be demolished by issuing notice under Section 351 of the BMC Act. As against this, learned Senior Advocate for the Corporation Shri Walavalkar supported the order passed by the learned Judge, City Civil Court, Bombay.

13. It is not in dispute that in the shop premises of Laxmi Building, plaintiff's father and his brother were conducting a Gymnasium. It is also very clear from the material on record that subsequently, a shed was constructed behind the said shop in the open space. It is also prima facie clear from the material on record that the said shop as well as the shed were assessed for the purposes of taxes. However, it is needless to say that merely because a particular structure is assessed by the Corporation for the purposes of taxes that does not mean the same has been constructed after obtaining necessary permission from the Corporation.

14. In the instant case, the material point which has to be decided is whether the suit shed was constructed after obtaining necessary permission from the Corporation or whether the said shed is unauthorized. It appears that now the dispute is between Plaintiffs and the builders. What plaintiffs are entitled to receive from the builder is not a question for consideration in the present suit.

15. Admittedly, Plaintiffs are not having even a single document to show that the suit shed was constructed after obtaining necessary permission from

the Corporation. Though, it is tried to be suggested that the suit structure was constructed in the year 1962 or even prior to that, Plaintiffs have failed to adduce any prima facie evidence to substantiate the said allegation. On the contrary, it must be noted that Plaintiffs have in fact taken different stand at different stages. Once Plaintiffs have vaguely stated that suit structure was constructed prior to 1962 and at other place they have come out with a case that suit shed is constructed in the year 1950. If really according to Plaintiffs the suit shed was constructed prior to 1962 they would have certainly adduced some evidence in that behalf but no such evidence is forthcoming. In fact, though opportunity was given to the Plaintiffs to show that the suit shed falls in the category of demolished structure (for which datum is 01/04/1962), plaintiffs failed to produce any document before the Corporation and naturally, the Assistant Commission, 'E' ward passed necessary order holding the suit shed as unauthorized, illegal. Thus, notice issued by the Corporation under Section 351 of the BMC Act and the order passed by the Assistant Commissioner 'E' Ward can not be said to be illegal. So, the learned Trial Judge has rightly observed that Plaintiffs have failed to make out any prima facie case for granting temporary

injunction.

16. Turning to the question of balance of convenience and hardship it must be noted that by virtue of this notice and Notice of Motion, Plaintiffs in fact intend to stall development. In the present suit, it is not at all necessary to consider as to whether Plaintiffs are entitled for alternate accommodation in respect of the suit shed ? It is beyond the scope of the present suit. If there is any dispute between Plaintiffs and builder/developer with regard to extent of alternate accommodation that Plaintiffs are entitled to, Plaintiffs may try to redress the said grievance before the appropriate authority in appropriate proceedings. So, when Plaintiffs have failed to make out any prima facie case to show that notice issued by the Corporation is not illegal, there is no question of causing any inconvenience or hardship to the Plaintiffs. On the contrary, if such injunction is granted it will create hindrance in carrying out the development work at the suit site and that would cause hardship not only to the defendants but to other persons who are concerned with the said development. The learned Trial Judge therefore rightly dismissed the Notice of Motion.

17. There is nothing on record to show that discretionary order passed by the learned Judge, City Civil Court is illegal or arbitrary or capricious. Hence, there is no necessity to interfere with the said order in the present appeal from the order.

18. In this view of the matter, there is no substance in the present appeal.

Hence, the appeal is dismissed with costs.

At this stage, learned Advocate for the Appellants-original Plaintiffs submitted that till this date the operation of the notice or order issued by the Corporation in pursuance of Section-351 of the BMC Act was stayed and there was statusquo. The Appellants-Plaintiffs intend to challenge the order in the Superior Court and as such the statusquo granted earlier in respect of the suit shed be continued for a further period of 8 weeks.

Learned Advocate for the Respondents opposed the said submission. They also submitted that if at all statusquo is extended it should be for a short period.

It has been in fact observed by this Court that

real dispute is with regard to what Plaintiffs are entitled from developer and that is not the subject matter of the present suit. However, having regard to the fact that during all these years the statusquo in respect of the suit shed was in existence, only with a view to give opportunity to Appellants-Plaintiffs to approach the Higher Court, if they so desire, the statusquo in respect of the suit shed is extended for a further period of 4 weeks only.

(S.R.SATHE,J.)